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SUMMARY

Class Entertainment & Communications, L.P. (Class) herein replies to the Consolidated Opposition To Petitions To Deny Filed by GAF Broadcasting Company, Inc. (GBC), insofar as it opposes Class' Petition.

The Commission cannot ignore substantial and material questions of fact concerning GBC's qualifications that remain notwithstanding the reversal on appeal of a criminal conviction. The nature of the Court's ruling ~~was to eliminate the concerns deemed generally~~

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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AUG 21 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
)
GAF BROADCASTING COMPANY, INC.) File No. BRH-910201WL
)
For Renewal of License For)
FM Radio Station WNCN, New York,)
New York)

TO: The Commission

REPLY TO CONSOLIDATED OPPOSITION
TO PETITIONS TO DENY

Class Entertainment & Communications, L.P. (Class),
by its attorneys, hereby replies to the Consolidated
Opposition To Petitions To Deny (Opposition) filed by GAF
Broadcasting Company, Inc. (GBC) on July 1, 1991,^{1/} inso-
far as it addresses Class' Petition.

I. Criminal Allegations Relating To
GBC's Parent and a Former Principal
Remain Pertinent

A. The Scope of Commission Concern

GBC principal reliance is on the assertion that a
conviction is "essential" before alleged criminal
misconduct will be considered by the Commission.
Opposition, p. 10. This proposition may derive support
from the initial policy statement, Character Qualifica-
tions In Broadcast Licensing, 102 FCC 2d 1179, 59 RR 2d

^{1/}The time for filing Replies has been extended to
August 21, 1991.

801 (1986) (Character I) recon. denied, 1 FCC Rcd 421, 61 RR2d 619 (1986) (Character II). It is, however, substantially undercut by Character Qualifications Policy, 5 FCC Rcd 3252, 67 RR 2d 1107 (1990) (Character III) recon. FCC 91-146, released May 24, 1991 (Character IV). Pursuant to Character III and Character IV, the Commission indicated that it is "generally" beyond the Commission's expertise to resolve issues concerning law violations outside of its area of expertise and that it is therefore "generally" more efficient to "allow" other forums to resolve such matters. The Commission indicated that it intends "to be guided by these policies" while remaining "free to exercise....discretion in situations that arise." Character III, 5 FCC Rcd at 3252; Character IV at para. 6. As reformulated, an adjudication is clearly not invariably "essential".

It is also clear that the Commission's policy is premised on Commission concern as to its ability to resolve in a meaningful way allegations of particular misconduct. In this respect, the Opposition notes at p. 21 that one party to Character IV had raised an issue similar to that raised by Class, i.e., that even acquittal of a criminal charge does not necessarily resolve issues as to a licensee's qualifications given the substantially higher burden of proof in a criminal

case.^{2/} Character IV at para. 4. GBC characterizes Character IV as having "rejected" the argument. In fact, the Commission did not specifically reject the potential relevance of the higher standard of proof in criminal cases. Insofar as the party's proposal was implicitly rejected, it was clearly premised solely on the Commission's view as to the impracticality in general of the Commission adjudicating violations of other laws, which was in general deemed to outweigh the fact that the high standard of proof applicable in criminal cases could result in an inability to convict notwithstanding the presence of evidence that could support an adverse finding under a lesser standard of proof.

It should finally be noted that none of the Character policy rulings addressed the specific factual circumstances that have arisen here. A decision to ignore these circumstances thus could not be justified by rote reliance on general policy.

B. Compliance With Section 309(d)(1)

GBC initially claims that Class' reliance on sworn

^{2/}The party in Character IV urged that the mere existence of the indictment would suffice to raise issues. While Class would support that view, it is not the position of Class here. Thus, the circumstances of this case have created a record far more extensive than a mere indictment. Moreover, there has yet been no acquittal but rather a conviction overturned on appeal.

testimony in the criminal case by Boyd Jeffries as recounted in U.S. v. GAF Corporation, 928 F.2d 1253, 1256 (2d Cir. 1991) (Decision) fails to comply with Section 309(d)(1) of the Communications Act of 1934, as amended (the Act). It is GBC's position that Class would be required to provide a separate declaration or affidavit from Jefferies restating his prior sworn testimony in the criminal case. This is without merit.

Section 309(d)(1) requires that a petition to deny support allegations of fact "by affidavit of a person or persons with personal knowledge thereof"; however, the Act excepts from this requirement those facts of which official notice may be taken. The testimony at issue was given under oath and is recounted in a judicial decision that may be officially noticed. Moreover, GBC does not dispute the accuracy of the judicial statement of the pertinent sworn testimony.

The Commission has held that there is no need for separate verification of facts where they appear in other records or decisions of the Commission. Eagle Broadcasting Co., 20 FCC 2d 233, 17 RR 2d 766, 768 (1969). The same principle necessarily applies to facts appearing in judicial decisions which may be officially noticed. Obviously, had the conviction been affirmed, there would have been no need to supply new affidavits alleging that

a violation had occurred. Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034, 67 RR 2d 1094 (1990) (Williamsburg). There is also no need to supply new affidavits verifying facts that appear in the Court's Decision. Class has competently established in a manner consistent with Section 309(d)(1) that Jefferies gave sworn testimony to the effect described in the Court's Decision, 928 F.2d at 1256, which can be relied upon for present purposes to the same extent as if a new sworn statement from Jefferies to the same effect were supplied.

C. The Impact Of The Decision

GBC does not dispute Class' underlying contention, i.e., that the impact of the Court's Decision is that if Jefferies' pertinent testimony is true, then a violation of the pertinent criminal statutes could properly be found. GBC's extended discussion at p. 14-19 of its Opposition merely serves to reinforce the fact that the Court's only concern related to the sufficiency of efforts to establish the credibility of Jefferies' testimony.^{3/} Moreover, the sufficiency of those efforts was obviously determined by the high standard of proof

^{3/}Reliance in this discussion on the dissent to the Decision is improper in that the dissent does not constitute the opinion of the Court which may be officially noticed.

applicable in a criminal case.

As a result of the Decision, the Commission is no longer in a position where it would have to make legal conclusions as to the applicability of other laws in order to resolve substantial and material questions of fact that remain. It would be required only to resolve the credibility of factual claims which is a task the Commission is frequently called upon to perform, even though the task may involve considerations going into areas beyond the Commission's usual area of concern.WHW Enterprises, Inc. v. FCC, 753 F.2d 1132 (D.C. Cir. 1985) (resolution of misrepresentation issue required consideration of questions relating to land title). No colorable claim could be made that resolution of the truthfulness of Jefferies' testimony is a task beyond the Commission's ordinary competence or of a nature distinguishable from tasks routinely performed in numerous cases. Nor is there any basis for the suggestion in the title of Section III(B)(4) of GBC's Opposition that the Commission would thereby be substituting its judgment for that of the judiciary. Nothing in the Second Circuit's Decision reflects a judgment that the facts should not be ascertained. The Decision merely found that they had not been ascertained in a manner proper in the criminal context in the particular proceeding under review. The

Court clearly recognized the existence of facts which could support a finding of a law violation. For the Commission to ignore the substantial and material questions of fact as yet unresolved could not be squared with the stated rationale for the general policy as articulated in Character IV, given that the only remaining task is one of routine fact-finding. The Decision eliminates any need for making legal conclusions as to whether facts which might be found violate other laws.

Nor is there any relevance to cases cited at p. 13-14 of GBC's Opposition to the effect that under Federal criminal law a reversed conviction is of no legal effect. Class' position is not premised on the mere existence of a reversed conviction but upon the continuing presence of unresolved questions of fact as clarified by the Decision, a judicial action of continuing validity. In any event, the status of the conviction for purposes of the criminal law in no way forecloses the Commission from taking cognizance of the fact that a jury convicted the defendants only to be reversed for reasons that obviously arise from the high standard of proof applicable in the criminal context.

It is understood from press reports that the U.S. Attorney has decided not to press for a fourth criminal

trial. This cannot be viewed as a "vindication" of the defendants in any sense. It doubtless reflects only a balancing of the resources that a fourth trial would require against the likelihood of success in view of the high burden of proof that must be met in the criminal context without the benefit of discovery or the ability to otherwise require full and candid disclosure by the defendants. Given that the Government has pursued this matter through three trials, a decision reflecting the practical difficulties that might arise from a fourth trial cannot be viewed as evidencing any lesser concern as to the substantial questions of fact that (unless pursued by this Commission) would be left unresolved, let alone as a "vindication". That GAF has successfully stonewalled in the criminal context (where stonewalling is a constitutionally permissible tactic) is no justification for this Commission ignoring the unresolved questions of fact in the context of deciding whether the public interest would warrant renewal of GBC's license (where stonewalling is not a permissible tactic).

D. The Involvement of Heyman

The testimony of Jefferies is clearly sufficient to raise a substantial and material question of fact as to involvement by GBC controlling principal Samuel J. Heyman in the alleged misconduct, bearing in mind that the truth

of Jefferies' testimony must be assumed and that a petitioner need not fully prove its case, i.e., it need only show a great deal of smoke not necessarily the existence of fire itself. Astroline Communications Co. v. FCC, 857 F.2d 1556, 65 RR 2d 538, 541-42 (D.C. Cir. 1988). According to Jefferies, Heyman called him to tell him that he would shortly receive a telephone call from Heyman's subordinate, James T. Sherwin, who in fact called him later the same day to arrange for the illegal fixing of a stock price. It is a reasonable inference that Heyman was aware of the purpose of the anticipated call sufficient at least to raise a substantial and material question of fact. GBC's response at p. 21 of its Opposition consists of a one sentence conclusory assertion that does not suggest any other inference that could arguably be drawn from this conduct. Nor is any affidavit supplied from Heyman denying or explaining the facts.

This is consistent with a longstanding policy of evasion and stonewalling concerning Heyman's role detailed in pleadings cited at p. 7 of Class' Petition. GBC's persistent and continuing refusal to provide facts to the Commission concerning this matter lends weight to the inference that could in any event be made from Jefferies' testimony.

E. The Consent Decree

Class has urged that the existence of a consent decree between the SEC and GBC's parent, GAF Corporation (GAF), is one pertinent factor requiring Commission inquiry notwithstanding that it might not be sufficient "by itself". This is a question that cannot be resolved from the Character policy statements themselves. GBC relies upon the policy stated in Character IV, para. 6, that the Commission will "generally" avoid situations requiring it to "reach legal conclusions on the basis of any stipulated facts" (emphasis added). Here, however,

inconsistent with GAF's theory in the criminal case as
reflected in a jury instruction concerning the

resolving these issues without a hearing. See Class' Reply to Response to Commission Staff Letter Dated December 19, 1990 filed February 1, 1991; and the February 19, 1991 Reply of Listeners Guild, Inc. to Response of GAF Broadcasting Company, Inc. to Commission Staff Letter Dated December 19, 1990.

It should be noted that GBC's prior arguments as to the relevance of even proven misconduct were premised in large part on efforts designed to distance GBC and the station from GAF and its personnel. This caused the Bureau in its December 19, 1990 letter to question whether there had been an abdication of responsibility by top officers of the licensee. This forced GBC to backtrack from the implications of its prior claims as clearly perceived by the Bureau. GBC Response to Commission Staff Letter Dated December 19, 1990, p. 5-6, 8-10. The record at this point clearly cannot support GBC's original claim that it is so "autonomous" of GAF that misconduct of GAF does not reflect upon GBC's qualifications, an issue which must be explored at hearing.

Finally, GBC's contentions in this respect have never taken into account the issue of the extent of Heyman's responsibility for any GAF misconduct. GBC has consistently stonewalled on this issue, which clearly

could not be resolved without a hearing given that the only presently available evidence is the testimony of Jefferies.

II. An Issue Is Warranted Concerning GBC's Candor

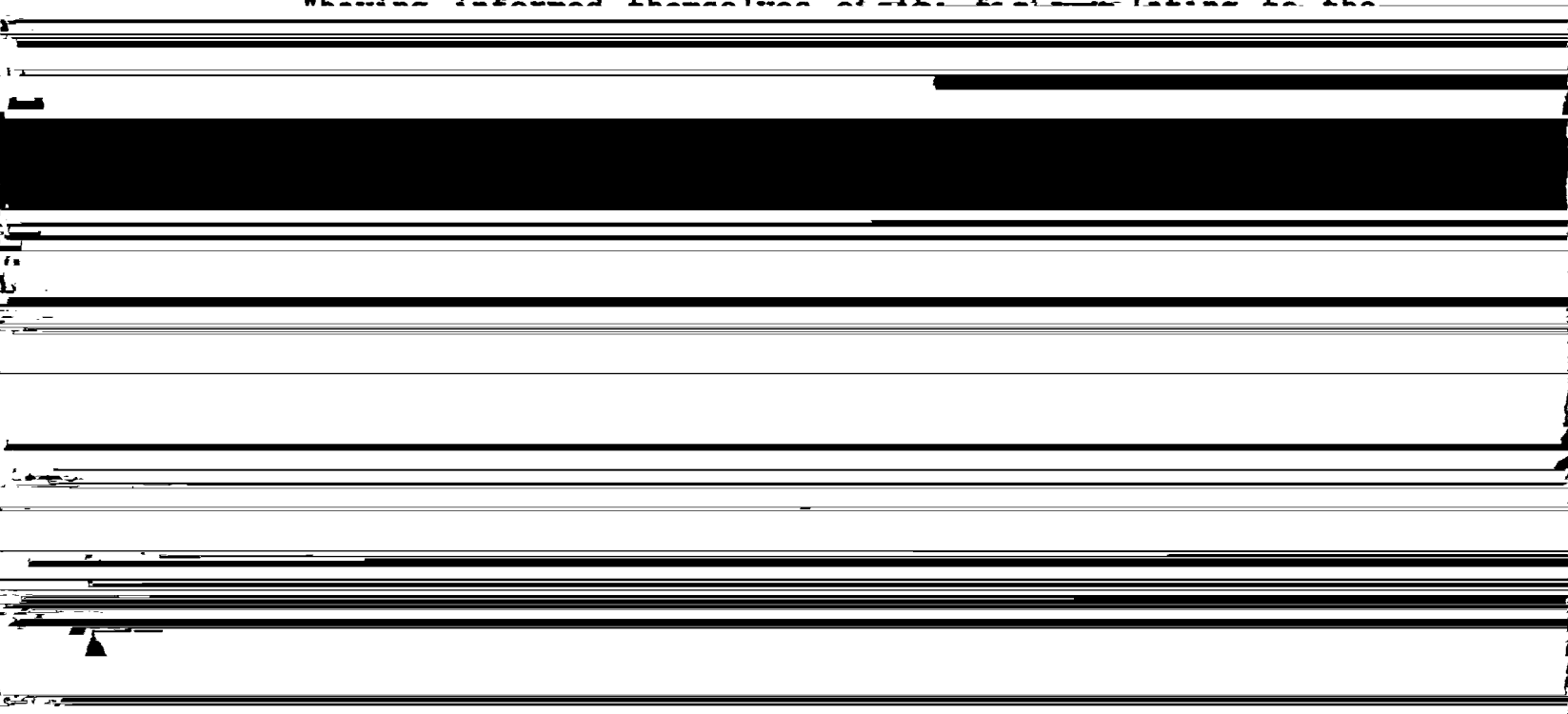
GBC's candor problem begins with its initial July 27, 1988 amendment to transfer of control applications reporting the indictments. It was therein asserted, under certification of Heyman, that both GAF and Sherwin were "confident of complete vindication". It was further asserted that this was based on Heyman and other officers of the proposed transferee (which included Sherwin)" having informed themselves of the facts relating to the charges..."

The facts as stated in the testimony of Jefferies (which must be assumed as true for present purposes) clearly raise a substantial and material question of fact as to the truth or candor of the above claim. It is not readily apparent how GAF or Sherwin could claim a confidence in "complete vindication" assuming that the facts recounted by Jefferies were known. GBC does not attempt to provide an explanation as to how the amendment could be squared with the facts alleged by Jefferies.

GBC principally relies upon the invalid claim that the Jefferies testimony cannot be considered under Section 309(d)(1) of the Act. This contention is without merit as discussed above.

GBC at p. 30 of its Opposition further asserts that the amendment was "an honest statement of the parties' expectations" reflecting their "belief" that GAF and Sherwin would not be convicted. Initially, GBC itself fails to comply with Section 309(d)(1) of the Act which places the same verification requirement on oppositions that apply to petitions to deny. No affidavit even of a conclusory nature is provided to support the factual assertion as to the intent underlying the claim.

The characterization at Opposition, p. 30, is in any event at variance with the plain language of the amendment. Thus, the amendment does not purport to be based on the "expectations" or "belief" of Heyman and the GAF officers. It rather purports to be based on their "having informed themselves of the facts relating to the



that the charges were without factual basis. The Decision finds nothing more than on evidentiary error in the trial under review that leaves the facts unresolved.

GBC also alleges that there was no motive for its action. There is in fact an obvious motive for minimizing the significance of a serious criminal indictment, even in the absence of other considerations. Moreover, there was a specific motive in the case of the instant amendment. Thus, as noted at p. 6 of Class' May 18, 1990 Petition To Require Filing Of Early Renewal Application, the indictments were handed down on July 6, 1988 during the pendency of GBC's transfer of control applications. As reflected in an August 1, 1988 letter from Heyman to former Chairman Patrick, the expeditious grant of these applications (which were hotly contested by the Guild) was urgently desired by GBC. It had a clear motive to convince the Commission that the indictments raised nothing that should concern the Commission to avoid possible delays in action on the transfer applications. At very least, the issue of deceptive intent cannot be resolved without a hearing.

It should be further noted that the transfer applications remain pending and the July 27, 1988 amendment has never been further amended to delete or explain the representation that the criminal charges are

without factual basis. During this period, the accuracy of this claim has been repeatedly attacked by the Guild and Class. Even assuming that the amendment lacked a deceptive motive at the time it was first filed, there has clearly long existed a motive for failing to correct it, which action would require GBC to do what it has desperately sought and still seeks to avoid - make candid disclosure of the facts concerning the criminal charges.

GBC further seeks to rely upon the claim that it has timely reported the various developments in the litigation against it. Opposition at 31-33. This is only partially correct in that it failed to report the proposed SEC proceeding against it until after a consent decree was reached, as conceded at GBC Opposition, p. 32. In fact, pursuant to RKO General, Inc., 78 FCC 2d 1, 47 RR 2d 921, 999-1001 (1980) aff'd in pertinent part sub nom. RKO General, Inc. v. FCC, 670 F. 215, 50 RR 2d 821, 835-42 (D.C. Cir. 1981) (RKO), GBC's obligation to report was triggered when it became aware that the SEC had formed an intent to proceed. Moreover, little significance can be attached to the mere fact that events in the criminal case were reported since they were well-known and well publicized so that the possibility of concealment did not exist.

At p. 31 of its Opposition, GBC asserts that its

reporting of the events complied with FCC Form 315, Section II, question 4. It quotes the two inquiries made in that question; however, it conveniently omits the following requirement imposed on applicants which respond affirmatively to either of the inquiries cited by GBC that they provide:

"a full disclosure concerning the persons and matters involved, identifying the court or administrative body and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and disposition or current status, of the matter."

GBC has consistently not only failed but refused to comply with the requirement of "full disclosure". This is evident from the necessity of the Bureau to make inquiry into matters that should have been fully disclosed voluntarily. It is further evident from GBC's persistent refusal to address matters, such as the involvement of Heyman, that it does not wish to address. GBC has clearly followed a policy of "selective" rather than "full" disclosure. In analogous circumstances, the failure to provide "full disclosure" pursuant to an identical provision of FCC Form 301 has been found to warrant a misrepresentation/lack of candor issue. Williamsburg, supra, 67 RR 2d at 1094-95. The applicant there merely vaguely reported a pending felony charge which it deemed beyond the Commission's concern (it also

ultimately failed to report a conviction; however, that failure was the subject of a separate Section 1.65 issue). GBC has similarly limited its disclosure only to those matters it believes the Commission should consider.

On March 13, 1990, GBC filed a Supplement designed to convince the Commission that the conviction created no bar to the affirmance of the grant of the transfer applications. At. p. 6, it recognized that the following question was relevant to its contention:

How is the independent committee to be composed?

filing of GBC's Supplement, candor would have required full disclosure as of that date and at least for the ensuing year, even assuming arguendo that the Decision would now excuse GBC from any disclosure requirements. At any point during that year, the Commission could have acted to affirm the grant of the transfer applications without knowing the serious questions as to Heyman's involvement reflected in Jefferies' testimony.

Finally, in its instant Petition Class raised the logical question of whether GBC concedes or disputes the pertinent Jefferies testimony. GBC categorically refuses to respond. Opposition at p. 30. Given GBC's prior claim that the criminal charges lacked any basis in fact as well as its claim that even a conviction would not impact its qualifications, it has a clear obligation to respond on the merits to evidence inconsistent with those claims.

Ultimately, GBC's theory is that it is free to make any claim that supports its case while withholding evidence or stonewalling with respect to other relevant topics it does not wish to address. This cannot be squared with the duty of candor articulated in RKO. The Commission in RKO emphasized the need for full and meaningful disclosure and made clear that licensees could not evade that obligation by playing procedural games

with the Commission through representations that, even if technically correct, nonetheless skirted the real issue by failing to make full and meaningful disclosure. 47 RR 2d at 998-99. The Court also emphasized that:

"...this means that 'proceedings before the Commission are not private law suits,' and that the Commission does not function 'as an umpire blandly calling balls and strikes for adversa-

Opposition makes various claims concerning its pro-

CERTIFICATE OF SERVICE


I, Linda Gibson, a secretary with the law firm of Cohen and Berfield, P.C., do hereby certify that on the 21th day of August, 1991, a copy of the foregoing, "Reply To Consolidated Opposition To Petitions To Deny" was sent via first class mail, postage prepaid to the following offices:

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